1961

Arliean Vickers Barrett and George C Barrett v. Leland H. Vickers, et al.. : Brief of Respondents

E SUPREME CO
of the
ATE OF

TABLE OF CONTENTS

INDEX OF CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

ARLIEAN VICKERS BARRETT and GEORGE C. BARRETT,

Plaintiffs and Appellants,

vs.

LELAND H. VICKERS, et al.,

Defendants and Respondents.

Case No. 9410

BRIEF OF RESPONDENTS

Joseph S. Barrett and Ethel V. Barrett, his wife

The complaint in this case, which was filed on September 23, 1942, seeks an accounting and a partition of the land owned by the parties as tenants in common, or, if a partition cannot be had, a sale of the property. An answer and counterclaim was filed seeking partition of the property, and an accounting. The reply set up numerous claims against the defendants, and the plaintiffs sought a money judgment (R. 1-25).

The files show that the parties have been in a running fight over the items set out in the pleadings for about 18 years with objections at about every step in the proceedings. As stated in the appellant's brief, "Judge Sevy held numerous hearings in an effort to resolve the differences between the parties, all to no avail" (p. 6).

There is no transcript of testimony in the file, either of the main trial, or the "numerous hearings."

STATEMENT OF POINTS

1. Findings of fact by the trial court are not reviewable on appeal in the absence of the evidence.

2. These respondents concede that the trial court should have ruled on the issues of partition or sale of the property and on accounting matters since 1946.

ARGUMENT

THE FINDINGS OF FACT ARE NOT REVIEWABLE

The appellant's first point is that the trial court erred in its calculations of the various credits and in the interest rates allowed. It appears in findings of fact No. 11 that on July 11, 1945, the State Land Board was paid the entire balance due on the land purchase contract and this payment resulted in a balance of credits in favor of the respondents, and in claim that the appellants should not have been charged interest in excess of the 4% provided by the state contract.

This claim is obviously an attack on the findings of fact without bringing to the appellate court a transcript of the

evidence. The rule is well settled that findings of fact are not reviewable on appeal in the absence of the evidence. Mansfield v. Sinaloa Land and Fruit Co., 43 U 417, 134 P. 1017; Coates v. Allen, 88 U 545, 56 P 2d 612; Dahlberg v. Dahlberg, 77 U 157, 292 P. 214; Hutchinson v. Smart, 51 U 172, 169 P. 166.

Where an appeal is taken without including a transcript of the evidence in the record the appellate court is bound to assume that the findings of fact were true and supported by the evidence.

McGuire v. State Bank of Tremonton, 49 U 381, 164 P. 494; Taylor v. Paloma Min. Co., 51 U 500, 171 P. 147; Byron v. Utah Copper Co., 53 U. 151, 178 P. 53.

There is nothing before the court as to the reasons for the advance payment of the balance due on the state contract, or the circumstances under which the payment was made. This court cannot speculate on such matters and in the absence of the evidence cannot determine whether the interest rate should have been 4% or 8% or whether the calculation of the account was correct. This part of the judgment should be affirmed.

THESE RESPONDENTS CONCEDE THAT THE TRIAL COURT SHOULD HAVE RULED ON THE ISSUES OF PARTITION, SALE AND ACCOUNTING SINCE 1946.

One of the prayers in the complaint is for partition or, if that cannot be had, for a sale of the common property (R. 3). In the answer it is alleged that the property can be partitioned without material injury and the prayer is for partition (R. 13). In a supplemental counterclaim filed by two of the defendants some 12 years after the trial, it is alleged that the parties

divided the use of the property among themselves and ... prayer was that the court take further evidence on the matter of partitioning the property to determine whether the parties had divided the property among themselves (R. 43-45). The plaintiff replied praying that the property be sold (R. ... There is nothing in the record to indicate whether there was a hearing on the supplemental counterclaim and reply. The trial court made no finding on the matter of partition or sale but in finding No. 14 it is stated:

> "14. That during the cropping season of 1947 and until it is otherwise determined they shall maintain in the respective possessions of the property as they divided the same and each shall be entitled to the crops from his portion during said time." (R. 53).

In the conclusions of law, paragraph 4, and in the decision paragraph 5, the following appears:

> "4. That in light of developments since the trial of the case, it is inequitable and unfair to order a sale of the above-described property." (R. 53).
>
> "5. That in light of developments since the trial of the case, it is inequitable and unfair to order a sale of the above-described property." (R. 55).

There is merit in the contention of the appellants that the matters of partition and sale should have been ruled upon by the trial court and likewise the court should have ruled upon the claims which have arisen among the parties during the 13-year period between the memorandum decision and the entry of the judgment. See appellants' brief p. 12. The statement in the decision that the court would decide the question of claims for improvements which are "necessary, useful

substantial and permanent" if the owners were unable to agree (R. 33) has been relied upon by the parties. The trial court should have finally settled all issues.

The case should be remanded to the district court with directions to decide whether the property should be partitioned or sold and to complete the accounting from 1946 to date. This litigation should be concluded without the filing of further suits.

CONCLUSION

The part of the judgment settling the accounts to April 24, 1946, should be affirmed. The defendants, Joseph S. Barrett and Ethel V. Barrett, believe that there is merit in the contention that the trial court should have determined the issues of partition or sale, and should have settled the accounts from 1946 to the date of judgment.

Respectfully submitted,

E. J. SKEEN
Attorney for Joseph S. Barrett
and Ethel V. Barrett, his wife.
522 Newhouse Building
Salt Lake City 11, Utah